DETERMINING THE APPROPRIATE FORUM BY THE APPLICABLE LAW

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Abstract The concepts of jurisdiction and applicable law have been traditionally regarded as separate inquiries in private international law: a court only considers the applicable law once it has decided to adjudicate a matter. While such an approach still generally applies in civil law jurisdictions, in common law countries the concepts are increasingly intertwined. This article examines the relationship between jurisdiction and applicable law in two key areas: applications to stay proceedings on the ground of *forum non conveniens* and to enforce foreign exclusive jurisdiction agreements. While courts generally apply the principle that jurisdiction and applicable law should coincide where possible, there are circumstances where a court may retain jurisdiction despite a foreign governing law or may 'trust' a foreign tribunal to apply the law of the forum. This article seeks to establish a framework by which courts may assess the role of the applicable law in forum determinations.

Keywords: private international law, comparative law, jurisdiction, applicable law, *forum non conveniens*.

I. INTRODUCTION

The traditional structure of a case in private international law involves two distinct stages. In the first stage the forum court must determine whether it has jurisdiction to adjudicate a matter (the jurisdiction question). If jurisdiction is found to exist, then in the second stage the court must decide the law to be applied to the cause of action or merits (the applicable law or choice of law question). Some national and supranational systems of private international law continue sharply to observe this distinction. For example, under the Brussels I Regulation (recast)[1] which applies in the Member States of the European Union the basic rule of personal jurisdiction in Article 4 is that the defendant, if domiciled in a Member State, must be sued in the courts of that Member State. Alternative forums are provided to claimants in matters

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[1] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

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relating to contracts, torts, trusts, insurance, consumer and employee contracts and other civil obligations. A defendant when sued in any of the above places has limited scope to resist jurisdiction: the principal grounds being that a matter falls within the exclusive jurisdiction of another Member State (Article 24), that the parties have agreed to confer jurisdiction on another Member State (Article 25) or proceedings involving the same cause of action and between the same parties or related actions are pending in the courts of another Member State (Articles 29 and 30). Significantly, a court has no discretionary power to decline jurisdiction on the ground that a foreign court is a more appropriate forum for trial. Jurisdiction, once established, must be exercised.[2]

The EU law regime therefore prioritises certainty over flexibility, with the result that the law to be applied to the merits in each court is largely irrelevant to the determination of jurisdiction. A court of an EU Member State would only consider the law to be applied once jurisdiction was established and the matter proceeded to trial.

From the late nineteenth century, however, common law countries increasingly departed from this neat, binary structure that separates jurisdiction from applicable law.[3] Initially, jurisdiction was almost exclusively based on service of process on a defendant present in the forum. In such a case jurisdiction was founded as of right and a common law court was obliged to exercise jurisdiction, absent abuse of process by the claimant.[4] Any question as to the applicable law of the dispute or the appropriateness of the forum more generally were irrelevant in the decision concerning whether to exercise jurisdiction. After the passing of the 1852 Common Law Procedure Act, however, it became possible for English courts to exercise jurisdiction over foreign-based defendants by the court giving claimants permission to serve them outside the country. In such a case the court would only agree to adjudicate the matter if a 'gateway' or prescribed link existed between the action and the forum, and the court also considered itself an appropriate venue for trial. Not only did some of the 'gateways' for service out expressly refer to the applicable law, such as that forum law governed the contract, but the appropriate forum inquiry allowed for consideration of discretionary factors such as the applicable law.[5] From the 1970s onward common law courts,

[2] Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and The Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretation by the Court of Justice, 1979 OJ (C59) 71 (the Schlosser Report); *Owusu v Jackson* (Case C-281/02) [2005] ECR I-1383.

[3] J Fawcett, 'The Interrelationships of Jurisdiction and Choice of Law in Private International Law' [1991] Current Legal Problems 39. For a United States perspective see P Hay, 'The Interrelation of Jurisdiction and Choice of Law in United States Conflicts Law' (1979) 28 ICLQ 161.

[4] *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382.

[5] Fawcett (n 3) 41. Note also that the service-out inquiry also required (and requires) a claimant to show that its claim had a 'reasonable prospect of success', which could involve pleading and proof of foreign law.

particularly in England, began to treat cases involving service within and outside the forum similarly under a single framework of *forum non conveniens*[6] and so the flexible, discretionary approach to jurisdiction was strengthened.

In parallel with this development common law courts have long exercised a discretion to grant a stay of proceedings where parties have entered an exclusive jurisdiction or choice of court agreement. Typically, a claimant would be allowed to proceed in the forum if it could show 'strong reasons'[7] why the matter should not be decided by the foreign court. As considered later, some common law courts, particularly in Australia, have focused heavily on applicable law considerations when deciding whether strong reasons exist.

The purpose of this article is to focus on the two areas above, namely *forum non conveniens* and exclusive jurisdiction agreements, to assess the current role of the applicable law in jurisdictional disputes and to provide a conceptual framework for its use. An important question to consider is whether the co-mingling of jurisdiction and applicable law is desirable because, for example, it enables the court to take a valuable early snapshot of the merits of the parties' dispute and to tie the jurisdictional inquiry more closely to the merits. Also, if a jurisdictional determination is frequently the basis for early settlement of a dispute,[8] arguably a detailed consideration of matters such as the applicable law may facilitate this process. According to this view, therefore, 'the principles of choice of law and jurisdiction should operate sympathetically'[9] and not in isolation from one another.[10] The contrary opinion is that a policy of strict separation of jurisdiction and applicable law is preferable to prevent excessive expense and prolongation of jurisdictional inquiries as well as less informed conclusions on the applicable law. As will be seen, however, common law courts have generally favoured the first approach.

II. APPLICABLE LAW AND JURISDICTION: DEFINING THE RELATIONSHIP

As noted earlier, jurisdiction and applicable law were traditionally regarded as separate inquiries, a position which has largely been maintained in countries and systems which employ rigid, non-discretionary approaches to jurisdiction. The benefits of such an approach are simplicity, certainty and efficiency: establishment of jurisdiction is based on satisfying a narrow, specific rule and

[6] See eg *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

[7] *The Eleftheria* [1970] P 94.

[8] R Fentiman, 'Forum Non Conveniens' in *Encyclopedia of Private International Law* (Edward Elgar 2016) 797, 804.

[9] M Keyes, 'The Doctrine of Renvoi in International Torts: Mercantile Mutual Insurance v Neilson' (2005) 13 TLJ 1, 14.

[10] A Briggs, 'In Praise and Defence of Renvoi' (1998) 47 ICLQ 877, 878, 883 ('choice of law is a stepping stone for determining jurisdiction'); A Gray, 'Forum Non Conveniens: A Comparative Analysis' (2009) 38 CLWR 207, 237 ('the link between jurisdiction and choice of law issues needs to be more fully acknowledged').

can normally be resolved in a short hearing without the need for extensive documentary and oral evidence or submissions. Parties therefore enjoy reasonable predictability as to the rules to be applied and likely outcomes reached.

Concerns for efficiency and brevity in jurisdictional determinations have not, however, been confined to civil law countries. In 1986 in the landmark *Spiliada* case, which enshrined the modern English doctrine of *forum non conveniens*, one member of the House of Lords expressed concerns about unwieldy and protracted jurisdictional hearings. Lord Templeman issued a plea to parties to furnish 'a list of connecting factors to a judge to consider in the quiet of his [or her] room without expense to the parties, without reference to other decisions on other facts', with 'submissions [being] measured in hours and not days' and appeals rare.[11] Implicit in Lord Templeman's instruction is that a detailed examination of matters such as the applicable law in both the forum and the competing foreign court is undesirable and should be reserved for trial.

More recently, Lord Neuberger in *VTB Capital plc v Nutritek International Corporation*,[12] expressed a similar concern for restraint and proportionality in jurisdictional cases:

> The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in the jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial in terms of effort, time and cost …. It is simply disproportionate for parties to incur costs … and spend many days in court on such a hearing. The essentially relevant factors should … be capable of being identified relatively simply.

Despite these sentiments expressed at the highest judicial levels, the paradox is that in most common law countries today, jurisdictional disputes are the subject of intense and prolonged engagement by parties and courts. A key reason for this is that parties realise that a decision on forum can have substantial consequences for the parties' wider dispute and that a successful jurisdictional result can strengthen the hand of the victor in settlement negotiations.[13] For example, if a claimant, after receiving an adverse finding on forum, is forced to sue in a foreign court where it would be denied critical causes of action or remedies it may well consider the litigation to have no further purpose. Jurisdiction is therefore not an abstract inquiry removed from the merits but may indeed be determinative of them.[14] Further, early settlement

[11] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 465.

[12] [2013] 2 AC 337 [82]–[83].

[13] A Bell, 'The Natural Forum Revisited' in A Dickinson and E Peel (eds), *A Conflict of Laws Companion* (Oxford University Press 2021) 9, 15.

[14] See Fentiman (n 8); *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 [5]–[7].

of disputes (even after an extensive jurisdiction hearing) is arguably consistent with economy and efficiency if it avoids a costly trial. A *forum non conveniens* inquiry may also provide valuable insights for the parties in 'identifying the procedural and substantive parameters of any trial on the merits'.[15] Further, a thorough and careful jurisdictional inquiry also serves the key objective of protecting a defendant from excessive exercises of forum jurisdiction.[16] The common law courts' liberal attitude to lengthy forum disputes is also not surprising in an adversarial system where parties are generally given free rein to define the parameters of the litigation battle.[17] The pleas of Lords Templeman and Neuburger are therefore likely to continue to be in vain.

If a finding on jurisdiction can, in practice, determine the merits of a dispute what role does or should the applicable law play? At first glance the applicable law would seem to be highly relevant to any discretion to exercise jurisdiction given that it supplies the basis or bases upon which the dispute will be decided. All matters being equal, therefore, a conclusion that the law of the forum would apply to give the claimant relief in proceedings in the forum would seem to be a compelling factor in a court's decision to hear a matter.

The position is however more complex. Why should the claimant enjoy the benefit of a favourable applicable law when its advantage is merely the flip side of the defendant's disadvantage? If equality between the parties is an important touchstone in dispute resolution, then arguably the interests of both parties need to be considered. Such an objective may call for a more expansive treatment of the applicable law at the jurisdictional stage; for example, one that examines the position in the foreign court as well as the forum. Equally, in other cases, an argument can be made that the applicable law should have *less* relevance when compared to other factors such as the connections of the parties and the action with the respective jurisdictions. The applicable law may therefore have multiple roles in forum determinations and this issue will be explored in this article through the prism of two significant jurisdictional issues in Commonwealth countries: *forum non conveniens* and exclusive jurisdiction agreements.

III. *FORUM NON CONVENIENS* AND THE APPLICABLE LAW

A. General Approach in Forum Non Conveniens *Applications*

The starting point for considering the role of the applicable law in a *forum non conveniens* application is the famous speech of Lord Goff in *Spiliada*. His

[15] Fentiman ibid.

[16] P Rogerson, 'Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case' (2013) 9 JPrivIntlL 387, 409.

[17] 'In a free country it is the privilege of the litigating parties to decide for themselves whether to devote their resources to litigating about where to litigate': A Briggs, *Private International Law in English Courts* (Oxford University Press 2014) [4.406].

Lordship said that an English court, when confronted by an application by a defendant to stay proceedings on *forum non conveniens* grounds, should seek to locate the natural forum, that is the place with which the action and the parties have their 'most real and substantial connection'. Such forum is one in which the case can be tried 'more suitably for the interests of the parties and the ends of justice'.[18] The natural forum is located by examining connecting factors such as the place of the tort, the country where the contract is to be performed, the places of business of the parties, where the evidence is found or the law governing the transaction.

Hence, from the beginning, Lord Goff saw the applicable law as being a significant, though not sole, factor in determining whether the English court was the natural forum under the 'first stage' of *Spiliada*. Yet, this was not the full extent of its role. If, under the 'first stage', a foreign court was found to be the natural forum and a presumption of a stay arose, the claimant could rebut this presumption under the 'second stage' by showing that it would be deprived of a 'legitimate and juridical advantage' in the foreign court such that justice required refusal of a stay. In assessing whether such advantage existed, the applicable law would again be relevant as the claimant sought to compare the outcomes in the forum and the foreign court.

The above approach to the applicable law in *forum non conveniens* cases has been broadly adopted in common law jurisdictions that apply *Spiliada*, such as Singapore, Hong Kong, New Zealand and Ireland. The position in Canada is similar.[19] In Australia however, the position is less clear. Initially the High Court in *Voth v Manildra Flour Mills Pty Ltd*,[20] in expounding its 'clearly inappropriate forum' test, approved Lord Goff's analysis of connecting factors, including the law governing the relevant transaction as a material consideration in stay applications, and legitimate juridical advantages.[21] While the Australian test for *forum non conveniens*—that the defendant must show that the forum is 'clearly inappropriate' to obtain a stay—is more heavily weighted in favour of the claimant than the *Spiliada* principle, at the time of *Voth* it was assumed that the applicable law would have a similar role to that under the English test.

In later decisions, however, the High Court seems to have retreated from its earlier stated position on the applicable law. So in *Regie Nationale des Usines Renault SA v Zhang*[22] the court said that 'an Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the *lex causae*'.[23] This statement was subsequently endorsed by the court in *Puttick v Tenon Ltd*[24] where it was further said that the very existence of choice of law

[18] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 465.
[19] *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 [105].
[20] (1990) 171 CLR 538.
[21] ibid, 565–566.
[22] (2002) 210 CLR 491.
[23] ibid [81].
[24] (2008) 238 CLR 265 [31].

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rules denies that the identification of the foreign law as the *lex causae* is sufficient reason by itself for a court to decline jurisdiction.

It is not clear whether these views have led to a reduced regard for foreign law in stay applications in later Australian cases. For example, the New South Wales Court of Appeal in *Murakami v Wiryadi*[25] reasserted the orthodox position from *Voth* and *Spiliada* that the fact of the forum having to apply foreign law was a significant factor in determining whether jurisdiction should be exercised.[26] In particular, the need to prove foreign law is itself 'a source of prejudice'.[27] Yet the court balanced this view with a direction that sometimes it would not be appropriate to resolve choice of law questions on a stay application because the legal issues had not yet been fully identified.[28] Such an opinion suggests that applicable law questions may better be determined at trial when the issues have become more clearly defined.[29] While this argument has force, it could also easily be manipulated by a claimant to bring proceedings in an inappropriate jurisdiction to avoid an undesirable law in the natural forum. In response to a prompt stay application the claimant would simply assert that it was 'premature' to resolve the choice of law question. The applicable law would cease to become a factor in forum determinations, apart from in the clearest of cases.

Also, there have been admittedly very few cases in which stays have been awarded by Australian courts based on the significance of foreign applicable law compared to other common law jurisdictions, although this may be simply because parties failed to prove the law. It therefore remains an unresolved question as to whether there is a distinct Australian position from the general common law approach, although commentary supports this view.[30]

Finally, when considering common law jurisdictions it is also useful to note the special 'Trans-Tasman' regime that applies between Australia and New Zealand for jurisdictional determinations. In broad terms the scheme provides a *Spiliada* test for stay of proceedings with the applicable law being a relevant connecting factor in identifying the appropriate forum.[31] Interestingly, however, stage two of *Spiliada* has been removed and so the claimant cannot assert that it would be denied a legitimate juridical advantage if the case were heard in the other country's courts.[32] The dispensing with the denial of justice exception is, however, entirely understandable in the context of countries with close geographical proximity and substantially similar legal systems. Such an

[25] (2010) 268 ALR 377. [26] ibid [63], [150]. [27] ibid [150]. [28] ibid [66].

[29] Similar sentiments were expressed in *Puttick v Tenon Ltd* (2008) 238 CLR 265 [21], [24], [32].

[30] See eg A Bell, 'The Future of Private International Law in Australia' (2012) 19 AustILJ 11, 14: ('we will have increasingly in Australia transnational litigation where the governing law is not Australian law'); L Collins (ed), *Dicey, Morris and Collins The Conflict of Laws* (15th edn, Sweet and Maxwell 2012) [12-034]: '[the Australian position] is not consistent with English law'.

[31] Trans-Tasman Proceedings Act 2010 (Cth) (TTPA) sections 19(1), (2).

[32] TTPA section 19(2); *Nevill v Nevill* [2016] FamCAFC 41 [34], [40] and [45].

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approach will therefore limit the role of the applicable law in Trans-Tasman forum determinations.

B. *A Conceptual Framework for the Applicable Law in* Forum Non Conveniens *Cases*

It is now necessary to go beyond the earlier expressed abstract position and consider how courts have treated the applicable law in specific cases. While forum cases can be notoriously fact-specific, an attempt will be made to identify a framework for future guidance.

A valuable statement of principle was made by Lord Mance in *VTB*:[33]

> It is generally preferable other things being equal that a case should be tried in the country whose law applies. However that factor is of particular force if issues of law are likely to be important and there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum.

Three important propositions flow from this passage.

1. *Identity of applicable law and forum*

First, generally, forum and applicable law should coincide where possible. There are several reasons supporting this view. The first is that where the law of the forum governs a transaction it is obvious that the forum courts are best positioned to articulate and apply such law. In the pithy words of Adrian Briggs,[34] 'Foreign law belongs in foreign courts. It does not travel at all well.' Not only will forum judges have greater expertise and experience in the legal system than their foreign counterparts but the process by which foreign law would be applied by a foreign court is likely to be costly, inefficient and inaccurate.[35] In some countries competing expert witness statements will be involved to prove the foreign law while in others the court may locate the foreign law for itself. Neither situation is, however, equivalent to a local court performing the role. The reception of forum law in a country with different language and legal culture, for example common law principles in a civil code country, is particularly challenging and may lead to injustice to the parties.[36]

[33] *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337 [46].

[34] 'A Map or a Maze: Jurisdiction and Choice of Law in the Court of Appeal' (2007) 11 SYBIL 123, 124.

[35] Rogerson (n 16) 398–9.

[36] The Supreme Court of New South Wales in Australia may order that a question of foreign law or its application be determined by directing that the parties commence proceedings on the point in a foreign court, but only where all parties agree. Memoranda of agreement have been entered into with the courts in Singapore and New York to allow each court to request an opinion from the other court on its law or to request the other court to appoint a referee to determine questions of law. So far, however, there is little evidence of these methods being employed and so their impact on stay applications has been negligible.

Comity concerns, namely maintaining harmonious relations with the countries and their judiciaries, are also furthered when courts do not accept jurisdiction too readily in cases involving questions of foreign law. Comity toward foreign legal systems was indeed a core rationale of *Spiliada*. A further concern is that rights of appeal on questions of foreign law are likely to be difficult if not impossible in most countries as foreign law is often considered a question of fact and even when regarded as a matter of law, courts may be understandably reluctant to pronounce on a foreign legal system or to conclude that it has been erroneously applied.[37] Hence, as a basic proposition it is sound to say that if forum law applies, the forum court should normally retain jurisdiction while the likely application of foreign law should produce the opposite result.[38]

2. *Factual dispute*

The second proposition flowing from Lord Mance's earlier remarks is that, by contrast, where the matters in dispute are predominantly factual, then the applicable law will have less significance compared to other connecting factors such as the location of evidence and the parties. Such a conclusion is simply a consequence of the broad *Spiliada* discretion: if legal issues are less significant for resolution of the dispute, then obviously other connections will be emphasised. Common law courts have reached this conclusion in several decisions.[39]

3. *Ease of application of foreign law*

The third proposition is that the exercise of jurisdiction by the forum court will be more justifiable, even where foreign law governs, when the legal issues in dispute are straightforward or no difference has been shown between the foreign and forum laws that would make local adjudication difficult.

These principles have been applied in many cases in common law jurisdictions. A good example is the English Admiralty Court decision in *The Al Khattiya*.[40] This case concerned a tort claim arising from a collision in the territorial waters of the United Arab Emirates (UAE), with the parties agreeing that UAE law would govern. The court, however, found that the defendant failed to establish that such law was different from English law in any way that was likely to be material to the issues arising in the claim or that the UAE judge would be clearly and distinctly better placed to determine

[37] *Kiwi Air Ltd v UTS Geophysics Pty Ltd* [2013] NZHC 3236 [34], Rogerson (n 16) 400.

[38] See, for a recent example, *Satfinance Investment Ltd v Athena Art Finance Corp* [2020] EWHC 3527 (Ch) [110].

[39] *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337; *Coward v Ambrosiadou* [2019] EWHC 2105 (Comm); *Xiang Jun v Cheng Chiu Tung Gregory* [2017] HKCFI 1632 [48]; *Murakami v Wiryadi* (2010) 268 ALR 377.

[40] [2018] EWHC 389.

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and apply that law. Interestingly the court was not deterred by the fact that the UAE law was a civil law system noting that 'this court is very familiar with civilian legal systems and with expert evidence based on translations of foreign law texts'.[41] Instead, for foreign law to be a material consideration some distinct features or complexities of that law that would require local judicial expertise would need to be identified. The applicable law was therefore a neutral criterion, and a stay was refused. Hong Kong courts have often taken the same approach when dealing with cases involving Mainland Chinese law,[42] although in this situation presumably Hong Kong judges have more regular contact and hence familiarity with that system.

In cases where the competing forum is a common law country, courts have been even more willing to accept jurisdiction, in the absence of a showing of serious differences in the laws or complexities in the foreign system.[43] For example, one English judge noted that it is 'very relevant [in deciding to exercise jurisdiction] that Texas is another Anglophone common law jurisdiction'.[44]

By contrast, there have been several recent decisions where a foreign applicable law has been highly relevant in a stay being granted. What is characteristic about these cases is that the issues of foreign law presented to the court were novel and complex, differed widely from the law of the forum and were hotly contested by the parties, with little agreement between the experts.[45] Courts also expressed the concern mentioned earlier about pronouncing on unsettled and undeveloped questions of foreign law in the context of limited rights of appeal in the forum.[46] For example, there is some evidence that Singapore courts have been reluctant to accept jurisdiction in

[41] ibid [80].

[42] See eg *Xiang Jun v Cheng Chiu Tung Gregory* [2017] HKCFI 1632; *The Jin Hui* [2016] HKCFI 480.

[43] *Conductive Inkjet-Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch) (English and Texan law, claims for breach of contract and confidence); *Konamaneni v Rolls Royce India Ltd* [2002] 1 WLR 1269 [170] (no difference in Indian and English law of derivative actions); *Rambas Marketing Co LLC v Chow Kom Fai David* [2001] HKCFI 1361 [47] (Nevada law of gambling would not be 'unusually difficult' for Hong Kong judges); *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm)[120]–[121] (Tanzanian company and insolvency law based on English law); *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR (R) 543 (CA) (Singapore law of unjust enrichment identical to English law); *Anil Salgaocar v Thaveri Darsan Jitendra Lakshmi* [2019] 2 SLR 372 (CA) [55] (BVI and Singapore law); *Hiralal v Hiralal* [2013] NSWSC 984 [203] (Fiji and New South Wales law of trusts similar); *Haines v Herd* [2016] NZHC 1928 [14] (Vanuatu law very similar to New Zealand law); *Essar Steel v Algoma Inc* 2016 ONSC 595.

[44] *Conductive Inkjet-Technology Ltd v Uni-Pixel Displays Inc* ibid.

[45] *VTB Commodities Trading v JSC Antipinsky Refinery* [2021] EWHC 1758 (Comm); *PJSC Bank 'Finance and Credit' v Zhevago* [2021] EWHC 2522 (Ch); *Ditto Ltd v Drive Thru Records LLC* [2021] EWHC 2035 (Ch); *Dynasty Company for Oil and Gas Trading Ltd v Kurdistan Regional Government of Iraq* [2021] 3 WLR 1095 (Comm); *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399, 411.

[46] *VTB Commodities Trading v JSC Antipinsky Refinery* [2021] EWHC 1758 (Comm) [201]; *PJSC Bank 'Finance and Credit' v Zhevago* [2021] EWHC 2522 (Ch) [140]–[141].

cases involving Indonesian law, perhaps given its unique and complex mix of Dutch Codes and local customary law.[47] Deference to foreign courts in such cases is also consistent with a policy of maintaining harmonious relations with other countries.[48]

Occasionally, similar arguments have been made to support decisions to refuse stays in cases involving novel and difficult issues of *forum* law,[49] particularly where the competing foreign court is not a common law country.[50] The same conclusion has been reached in cases where forum 'public policy' is said to be involved (as opposed to simply forum law). In *EI du Pont de Nemours & Co v Agnew*[51] the Court of Appeal had to consider whether an indemnity to an insured should extend to claims for punitive damages. After finding that the policy was governed by English law by inference, the court found that the question of whether indemnification would apply under English law was unclear and would involve difficult issues of English public policy. Such a matter was not appropriate for a foreign court and so a stay was refused. A similar approach and result occurred in *Mitsubishi Corp v Alafouzos*,[52] in the context of a contract that was entered into to deceive a third party.

In comparison, there have been very few Australian decisions in which foreign law has been found relevant to a stay application. In the vast majority of cases, the courts have found that the defendant failed to prove any difference or distinctiveness in the foreign law to justify refusal of a stay.[53] As noted earlier, it is not clear whether this outcome is the result of a conscious judicial policy to lessen the importance of foreign law or because the parties have not sufficiently proven its contents.[54]

4. *Mixed applicable laws*

The significance of the applicable law can also be reduced where a claimant brings several claims, some governed by the law of the forum and some by

[47] See eg *Bambang Sutrisno v Bali International Finance Ltd* [1999] 3 SLR 140 (CA); *JIO Minerals FZC v Mineral Enterprises Ltd* [2010] SGCA 41 and generally A Pulle, '*The Spiliada* in Singapore: Time for the Scrapyard?' (2006) 8 Australian Journal of Asian Law 287, 302–3. The presence of Saudi Arabian law was a key factor in the grant of a stay in *Rotary Engineering Ltd v Kioumji and Eslim Law Firm* [2017] 1 SLR 907 (CA) [21].

[48] Rogerson (n 16) 401.

[49] *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB) (misuse of private information).

[50] *Teekay Tankers Ltd v STX Offshore and Shipping Co* [2014] EWHC 3612 (Comm); *FR Lurssen Werft GmbH & Co KG v Halle* [2009] EWHC 2607 (Comm) [53]–[54].

[51] [1987] 2 Lloyd's Rep 585.

[52] [1988] 1 Lloyd's Rep 191.

[53] See eg *Hiralal v Hiralal* [2013] NSWSC 984 [203]; *Benson v Rational Entertainment Enterprises Ltd* [2015] NSWSC 906; *Bombadier Inc v Avwest Aircraft Pty Ltd* [2020] WASCA 2; *Pocock v Universal City Studios LLC* [2012] NSWSC 1481; *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909 [40]; *Binqld Finances Pty Ltd (in liq) v Israel Discount Bank Ltd (No. 2)* (2020) 384 ALR 148 [188](a); *Stewart v Paladin Australia Pty Ltd* [2021] SASC 244 [68]; *Hargood v OHTL Public Coy* [2015] NSWSC 446; *Wilson v Addu Investments Private Ltd* [2014] NSWSC 381; *AB v XY* [2020] NSWDC 27.

[54] A recent rare exception of a stay being granted on this basis is *Nilepac Pty Ltd v Amstelside BV* [2020] NSWSC 57 (Dutch law); see also *El-Kharouf v El-Kharouf* [2004] NSWSC 187 (Jordanian law) (although this case predated *Puttick* and made no reference to *Zhang*).

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foreign law. An example of such a situation is where a claimant sues for multi-territorial intellectual property infringement. In *Performing Right Society v Qatar Airways Group QCSC*[55] a claimant sued for infringement of copyright under the laws of several countries. The action was not stayed by an English court in favour of Qatar since the laws of multiple States apart from Qatar and England would have to be applied and so convenience supported the matter remaining in England. The English law component of a mixed applicable law action has been used to 'anchor' the entitlement of the English court to adjudicate in other cases.[56] The Singapore Court of Appeal also refused to stay a matter where Singapore law applied to the tortious part of a proceeding, but German law applied to the remaining claims in equity. Given the mixture of governing laws, the court considered the criterion of the applicable law to be a 'neutral factor' under *Spiliada*.[57] There is consistent Australian authority.[58]

5. Trusting the foreign court: Common applicable law and equivalence approaches

In *VTB*[59] a majority of the UK Supreme Court also found that the fact that English law would likely apply to the tortious claims of deceit and conspiracy did not automatically mean that a stay would be refused. What was interesting here was that the competing forum was Russia—a civil law country—but the English court nevertheless had confidence that the foreign tribunal court could effectively decide the matter with no injustice to the claimant. The Supreme Court reached that conclusion by two independent but reinforcing pathways. First, the claimant had led no evidence to show that under Russian choice of law rules a Russian court would not apply English law. Secondly, if a Russian court applied its own law to the tort claims there was also no evidence 'to suggest that Russian law does not recognize and impose tortious liability for deceit and for conspiracy on bases for material purposes equivalent to those which would be recognized under English law'.[60]

The two criteria referred to by Lord Mance are crucial tools by which a forum court can 'trust' a foreign court on the question of the applicable law in circumstances where the latter court would apply forum law or an equivalent version of such law, such that the claimant's rights are protected.

[55] [2020] EWHC 1872.
[56] *Lyle & Scott Ltd v American Eagle Outfitters Inc* [2021] EWHC 90 (Ch).
[57] *Rickshaw Investments Ltd v Baron von Uexkull* [2007] 1 SLR 377; see also *Kyko Global Inc v M/S Crawford Bayley & Co* 2021 ONCA 736 [57] (forum and foreign law cancel each other out).
[58] *Lars SA v Bone China Pty Ltd* [2015] NSWSC 730; *Colosseum Investments Holdings Plc v Vanguard Logistics Services Pty Ltd* [2005] NSWSC 803; *Puccini Festival Australia Pty Ltd v Nippon Express Australia Pty Ltd* (2007) 17 VR 36; *Barach v University of NSW* [2011] NSWSC 431.
[59] *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337.
[60] ibid [47].

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The first method involves the forum court considering the choice of law position under both the law of the forum and the law of the competing court to assess whether both sets of rules would identify the same law (a 'common applicable law'). If the same legal system is selected by both choice of law rules (even if the rules themselves are different), then the forum can have some confidence that if trial proceeded in the foreign court there would be no denial of justice. While, as noted earlier, it is preferable that in most cases the applicable law and the forum be the same, there may be compelling other reasons why a stay should nevertheless be granted. For example, in *VTB* itself, the action was overwhelmingly factually connected with Russia. Alternatively, a finding of a common applicable law may influence a forum to *retain* jurisdiction on the basis that although forum law would be available in each court, the forum court is best equipped to apply its own system. Either way, a common applicable law approach provides a way of more fully expressing the applicable law issue in the stay application while still allowing the forum court to preserve its broader discretion to accept or renounce jurisdiction.

The second concept is 'equivalence' which arises in the case where a foreign court would not apply the law of the forum—either to the cause of action or the remedy—under its choice of law rules. The forum may then consider whether equivalent causes of action and relief exist under the law of the foreign country to those available under forum law. If such equivalence is found to exist, then once again the court may feel comfortable in granting a stay on the basis that the claimant will not be denied justice in the foreign court.

There have been several examples of both the common applicable law and equivalence approaches in decisions of common law jurisdictions.

a) Common applicable law

For example, in *Nima SARL v The Deves Insurance Public Coy Ltd*,[61] the English Court of Appeal found that, according to the expert evidence, a Thai court would also apply English law to the action. Given that the issue in question was discrete and uncontroversial the court was content to entrust the resolution of the matter to the foreign tribunal, particularly since the action was more substantially connected with Thailand. The applicable law method is therefore not only helpful in protecting the rights of the parties but also in strengthening comity and trust between local and foreign courts.[62]

A similar approach was taken by the Singapore Court of Appeal in *Rappo, Tania v Accent Delight International Ltd*[63] which concerned claims for breach of fiduciary duty, dishonest assistance and knowing receipt. The court granted a stay in favour of the courts of Switzerland after finding that Swiss

[61] [2002] EWCA Civ 1132.

[62] See also *Chase v Ram Technical Services Ltd* [2000] 2 Lloyd's Rep 418 (English court trusted Albertan court to apply English law).

[63] [2017] 2 SLR 265.

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law would apply to the claims, whether the case was heard in either country. Common applicable law was therefore used to anchor the court's conclusion that Switzerland was the natural forum under stage one of *Spiliada*. The court also relied on this conclusion to show that the claimant enjoyed no legitimate juridical advantage in having the case heard in Singapore under stage two of *Spiliada*. The fact that the same law would apply in both jurisdictions again neutralised this argument. Common applicable law has been used to support stay orders in other Singapore decisions.[64]

The common applicable law approach has been occasionally applied by Australian courts to determine the outcome of State applications under the *Voth* 'clearly inappropriate forum' test. In *Garsec v His Majesty the Sultan of Brunei*[65] the New South Wales Court of Appeal had to consider a breach of contract claim against the Sultan of Brunei. The court found that Brunei law applied to the claim under Australian choice of law rules and that pursuant to such law the Sultan was immune from jurisdiction. Since the foreign law immunity was classified as substantive and not procedural under Australian choice of law rules, it would apply in any Australian proceeding. As the Australian court also found that the Sultan would be immune from any proceedings that may be brought in Brunei, a stay was granted on the basis that no advantage existed to the claimant in bringing proceedings in Australia.

The common applicable law analysis therefore made a stay inevitable by showing that the claimant's case was futile wherever it was brought, since the same law would be applied under the choice of law rules of either country.

By contrast, the common applicable law approach may also be used to *refuse* a stay in circumstances where the defendant has argued that it would obtain a juridical advantage in proceeding in a foreign court, when in fact the same law would apply in each tribunal.[66] It is understandable in such a case that the forum would consider itself best placed to apply its own law.

A variant of the common applicable law analysis may also apply in the case where parties have expressly chosen the governing law of a contract but a foreign court would ignore or override such law. In this situation, the *outcome* in the competing courts is not the same but the parties intended a common result to occur by expressly choosing the applicable law and expecting that such law would be recognised in any forum. Where a foreign court, however, would disregard the parties' choice it is frustrating their intention to achieve a common applicable law. For that reason, the foreign court should not be the appropriate forum. This issue is explored in more detail at section III.B.6 below.

[64] See eg *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 (aff'd [2019] SGCA 80). Briggs criticised the Singapore Court of Appeal in an earlier decision (*Rickshaw Investments Ltd v Baron von Uexkull* [2007] 1 SLR 377) for simply assuming that the foreign court would apply the same choice of law rules as the Singapore court: (n 34) 131. For the common applicable law approach to be applied correctly, expert evidence of the foreign choice of law rules must be adduced as occurred in *Rappo* and *Skaugen*.

[65] (2008) 250 ALR 682.

[66] *Doe v Armour Pharmaceutical Co Inc* [1994] 3 IR 78.

b) Equivalence

An example of application of the 'equivalence' approach arose in the English Court of Appeal decision in *Re Harrods (Buenos Aires) Ltd*.[67] There, a claimant brought a petition under the English Companies Act seeking an order that the defendant purchase the claimant's shares in an English-incorporated company that carried on business in Argentina. In the alternative, an order for winding up was sought. The Court of Appeal granted a stay in favour of the Argentinian courts, noting that under Argentine law no remedy of 'buyout' was available, but the claimant could still obtain comparable relief to that available under English law through an award of damages and an order for winding up. The decision of the Hong Kong Court of First Instance in *PT Bali Hospitality Utama v Echene*[68] is consistent with this, with the court finding that although Indonesian law did not recognise the claimant's claim under Hong Kong law for tortious interference with contractual relations, comparable redress was available. A stay could therefore be granted with no substantial injustice to the claimant.

Australian and New Zealand courts have also employed the equivalence approach. In *PCH Offshore v Dunn*,[69] the claimant sued in Australia for breach of contract and breach of statutory and fiduciary duties arising out of activities in Azerbaijan. The Australian court granted a stay, finding on the basis of expert evidence of Azeri law that its courts would have jurisdiction to hear the claimant's claims and could grant substantially equivalent relief to that which would be available under Australian law. Because the claimant would again suffer no loss of juridical advantage, a stay was awarded.

In the area of misleading and deceptive conduct where claimants have brought proceedings under forum statutes, New Zealand courts have granted stays after it has been established that equivalent relief would be available under the law applicable in the foreign court. As the High Court of New Zealand recently said in *Sequitur Hotels Pty Ltd v Satori Holdings Ltd*,[70] since 'broadly comparable relief' could be obtained by the claimant in the foreign court to that available under New Zealand statute,[71] no substantial injustice would occur by a stay.[72]

Australian courts appear less willing to accede to such an argument. They consider that the prohibition on misleading and deceptive conduct under section 18 of the Australian Consumer Law 2010 (Cth) (ACL) is a 'substantive mandatory rule' of the forum[73] and that there is therefore a public interest in 'application of a statute of this nature by a court selected by

[67] [1992] Ch 72. [68] [2010] HKCFI 115. [69] (2010) 273 ALR 167.
[70] [2020] NZHC 2032. [71] Fair Trading Act 1986.
[72] See also *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502 [103]–[104] where the court said that it should not be assumed that a foreign court would not give effect to the New Zealand Act.
[73] *DA Technology Australia Pty Ltd v Discreet Logic Inc* Federal Court of Australia, 10 March 1994; *Commonwealth Bank of Australia v White* [1999] 2 VR 681.

Parliament'.[74] Despite the absence of express statutory words conferring exclusive jurisdiction on Australian courts in respect of such claims, 'public policy considerations'[75] are said to lead to the same result. Consequently, stays have generally been refused, with courts also routinely rejecting attempts by defendants to show that equivalent rights exist under foreign law or that the ACL claims could themselves be justiciable in a foreign court.[76] Two decisions exceptionally contradict the trend. In the first,[77] equivalent relief was found to exist to the ACL under foreign law while in the second,[78] the forum court accepted that the foreign tribunal would have subject matter jurisdiction to hear the ACL claim, although no foreign choice of law rules were pleaded. Overall though, Australian courts strongly defer to the law of the forum in this area. The interaction of forum mandatory statutes and exclusive jurisdiction agreements is considered later.[79]

6. *Party autonomy and the applicable law*

Commonwealth courts also draw a distinction in terms of the value accorded to the applicable law between cases where the parties expressly choose the governing law of their transaction and where the applicable law was found by the court on a default basis. In several decisions it has been suggested that the duty to uphold party expectations and intentions expressed in governing law clauses should not only extend to recognition of the clause itself but also to giving the clause strong weight in a forum determination. English courts particularly have adopted this position in respect of English choice of law clauses, where the parties' chosen law would not be given effect by the foreign court due to the operation of local mandatory rules.

Such an approach has the blessing of Briggs who argues that choice of law agreements are promissory in nature. Parties must be taken to have agreed to refrain from bringing proceedings in jurisdictions that are unlikely to give effect to express choices of law or would apply local regulatory rules to override them.[80] In such cases, therefore, an English court should be the appropriate forum. The protection of party autonomy is a key, universal

[74] ibid.

[75] *Karpik v Carnival plc (The Ruby Princess) (Stay Application)* [2021] FCA 1082 [337].

[76] See eg *Green v Australian Industrial Investment Ltd* (1989) 90 ALR 500; *CE Heath Underwriting & Insurance (Australia) Pty Ltd v Barden* Supreme Court of New South Wales, 19 October 1994; *Cantarella Bros Pty Ltd v Barilla Alimentare SpA* [1999] FCA 592 [8]; *Reinsurance Underwriting and Insurance (Aust) Pty Ltd* [2003] FCA 56 [321]; *Eurogold Ltd v Oxus Holdings (Malta) Ltd* [2007] FCA 811; *Mineral Commodities Ltd v Promet Engineers (Africa) Pty Ltd* [2008] FCA 30 [22]; *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320 [236]; *Urban Moto Imports Pty Ltd v KTM AG* [2021] VSC 616 [104] (unconscionability under ACL).

[77] *Laminex (Australia) Pty Ltd v Coe Manufacturing Co* [1997] NSWSC 665.

[78] *Armacel Pty Ltd v Smurfit Stone Container Corp* (2008) 248 ALR 573.

[79] See section IV.B.

[80] A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press 2008) [11.52]–[11.53] and (n 17) [4.411].

principle of the conflict of laws[81] as it creates certainty and predictability in international transactions.[82] Party autonomy deserves recognition in the context of a forum choice of law clause and jurisdiction as such a clause shows that 'the parties intuitively accept that the [forum] courts are … an appropriate place to decide their case'.[83]

Some English courts, however, have relied on an alternative ground to support refusal of a stay in the case of a forum choice of law clause: that the forum's own choice of law rules are superior to those of the foreign court and should prevail in the event of conflict.[84] This approach is far more problematic: in a stay application between competing courts with presumptively equal entitlements to adjudicate, it is hard to see why the choice of law rules of the forum should take precedence. It is little different to saying that the domestic law of the forum is better than that of a foreign country in all circumstances, an inquiry which English courts will not undertake.[85] Unlike party autonomy, which is a neutral and balanced criterion, a preference for forum choice of law rules is parochial and one-sided.[86]

The above issues were discussed in *The Lucky Lady*.[87] This case involved a Singaporean claimant and a Jordanian defendant, with the claimant bringing proceedings in England alleging that the Jordanian proceedings were contrary to an express choice of English law. The English court refused to stay the action, finding that it was an appropriate forum because (a) the parties had expressly chosen English law and (b) the foreign court would ignore the parties' choice and apply its own law to the prejudice of the claimant. This result was reached despite the case being more closely connected with the foreign country. The court noted that party autonomy is a fundamental principle of English conflict of laws and was particularly threatened where a foreign court would not respect an express choice of English law and apply different rules, leading to a different result. A strong body of English authority now supports the view that a stay should be refused in such circumstances.[88]

[81] S Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014) 346; A Mills, 'Conceptualising Party Autonomy in Private International Law' [2019] *Revue Critique de Droit International Privé* 417.

[82] TM Yeo, 'The Rise of Party Autonomy in Commercial Conflict of Laws' in V Bath, A Dickinson, M Douglas and M Keyes (eds), *Commercial Issues in Private International Law: A Common Law Perspective* (Hart Publishing 2019) 257, 258.

[83] Rogerson (n 16) 401.

[84] *Irish Shipping Ltd v Commercial Union Assurance Co Plc* [1990] 2 WLR 117, 134 (Staughton LJ); *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm) [33].

[85] *Herceg Novi v Ming Galaxy* [1998] 4 All ER 238, 247 (CA).

[86] M Hook, 'The Choice of Law Agreement as a Reason for Exercising Jurisdiction' (2014) 63 ICLQ 963, 964, 968–9; *accord* A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press 2003) [4.60].

[87] [2013] EWHC 328 (Comm).

[88] See also *The Magnum* [1989] 1 Lloyd's Rep 47 (English choice of law would be overridden by Spanish public policy); *Golden Ocean v Salgaocar* [2011] EWHC 56 (Comm); *The Channel Ranger* [2013] EWHC 3081 (Comm) and the comments by Collins LJ (as he then was) in *Novus Aviation Ltd v Onur Air Tasimacilik AS* [2009] EWCA Civ 122 [78]. See also Bell (n 86) [4.61].

It is suggested that this approach is impeccable: the parties had gone to the trouble of agreeing an express choice of law which would have been entirely undermined by the foreign proceedings. While this line of decisions has been criticised[89] for treating a choice of law clause as akin to an exclusive jurisdiction agreement, this overlooks the fact that a stay will only be refused where such a clause is present, *and* it would not be respected by the foreign court. An exclusive jurisdiction agreement, by contrast, may be enforced without proof of any legal consequence or outcome in the foreign court. The criticism, however, is stronger if an express choice of law were the sole basis upon which a court chose to exercise jurisdiction. As Simon J said,[90] 'it is an exceptional course to require a foreigner to litigate in the English court *purely* on the basis that English law is the governing law of the contract'.

Where, however, there is clear evidence of the clause being ignored or overridden in the foreign court the calculus in favour of a stay shifts, for in that case party autonomy is more directly threatened. Such a conclusion is consistent with the views of Collins J (as he then was) in *Sawyer v Atari Interactive Inc*[91] where he noted that an express choice of English law would only be a significant factor in determination of the appropriate forum where there was 'any substantial difference between English law and the law that would be applied by the foreign court [and] if there was a difference, whether under its rules of conflict of laws the foreign court would [nevertheless] apply English law'.

Consistent with the aim of upholding party autonomy it is also appropriate that a forum court give effect to an express choice of law of *a third country* in any stay application, again where there is evidence that the competing foreign court would disregard such a choice and deny the claimant any remedy. In *Banco Atlantico SA v The British Bank of the Middle East*[92] a UAE court was found to have 'no developed doctrine of conflict of laws' to enable it to apply the expressly chosen Spanish law and so the English court retained jurisdiction.

The above analysis squares with the earlier discussion on common applicable law. If a foreign court is likely to apply forum law in any proceeding, then the claim of the forum court to exercise jurisdiction is diminished, unless the legal rules are particularly complex or specialised and so unsuitable for a foreign court. To insist, however, that the forum court must hear any matter where its law is chosen is too wide and parochial a view.[93]

[89] Hook, (n 86) 964, 970–5.

[90] *FR Lurssen Werft v Halle* [2009] EWHC 2607 (Comm) [49] (emphasis added).

[91] [2005] EWHC 2351 (Comm) [62].

[92] [1990] 2 Lloyd's Rep 504.

[93] The inclusion of a forum jurisdiction clause (even if non-exclusive) *and* a choice of law clause however tips the balance in favour of exercising jurisdiction on the basis that this is yet further evidence of party autonomy on the issue of jurisdiction. This result occurred in the Australian case *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 where an anti-suit injunction was granted to restrain foreign proceedings brought in breach of New South Wales jurisdiction and choice of law clauses. The court there also found that the choice of law rules of

It also follows from the above discussion that the case for refusal of a stay is weaker where no express choice of law is present, as the party autonomy foundation is missing. If for example, forum law is only selected by the forum court as the *lex causae* based on broad factors of close connection, the applicable law's significance in a stay application should be less.[94] One reason is that a foreign court applying a similar default choice of law rule for contracts could legitimately reach a different conclusion on the governing law, unlike in the case of an express choice where the parties have consciously and deliberately sought to define the issue for themselves. In the case of an express choice the parties would reasonably expect that other courts would honour the parties' chosen law and not entertain proceedings that sought its nullification.

Consequently, the cases where a stay has been refused because forum law was found to govern in the absence of express party choice and a foreign court would apply a different law are more dubious. Such decisions cannot be supported on party autonomy grounds but only based on a preference for forum choice of law rules, a parochial view rejected earlier. The view that insurance cases should be treated as a distinct category in this context[95] is also hard to justify given that the parties could have clarified the position by including an express choice of law if they had wished.

It is contended therefore that the only situation, in the absence of an express choice of forum law, in which refusal of a stay is justified on applicable law grounds is where the claimant would be denied justice in the foreign court. As discussed later, this conclusion requires a showing of more than mere application of a *different* law but a case where the claimant would lose its major claim or key remedy. As Lord Goff said in *Spiliada* a claimant's showing that a foreign court would award higher damages or more generous discovery does not amount to a legitimate juridical advantage sufficient to preclude a stay.

7. Applicable law and denial of justice

Lord Goff specifically referred to denial of justice or loss of a legitimate juridical advantage as being a basis for which a stay is refused under the second stage of *Spiliada*. The judge, however, was careful to note that this was a strictly exceptional case that was not enlivened by the fact that the claimant would obtain a better outcome in the forum compared to the foreign court. Instead, there must be a loss of a fundamental cause of action or remedy; the

the foreign court would enforce the New South Wales choice of law clause (at [62]) and so a 'common applicable law' outcome was reached.

[94] cf *Novus Aviation Ltd v Onur Air Tasimacilik AS* [2009] EWCA Civ 122.

[95] cf *Dicey, Morris and Collins The Conflict of Laws* (n 30) [12-034] and *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279; *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2005] EWHC 1887 [79] (aff'd [2006] EWCA 389 [52]–[53]).

clearest case would be where the claimant would obtain no relief at all in the foreign court.

Consequently, an examination of the applicable law is valuable here as well: if the claimant can show, by comparison of the choice of law rules in each country that it would be denied justice in the foreign court then a stay should be refused. This criterion will apply in the case mentioned earlier where a contract is found to be governed by forum law on closest connection principles or, for example, in cases of torts or infringement of intellectual property rights where relief is available in the forum but not in the foreign court.

A useful example is the UK Supreme Court decision in *Unwired*.[96] This case concerned a UK claimant who sued a Chinese defendant for patent infringement. The defendant was under an obligation to make available standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. The court found that it had jurisdiction to determine the terms of a global FRAND licence without the agreement of all parties, but the competing Chinese court did not. A stay was therefore refused. A similar situation arose in *Celgard LLC v Shenzhen Senior Technology Material Co Ltd*[97] where a stay was also refused after evidence showed that only an English court could give relief for prohibited importation of goods into the United Kingdom. There are other English, Singaporean, Hong Kong, Canadian and Australian examples.[98]

In all such cases, therefore, there was no relief available in the competing forum; a circumstance which falls squarely within the stage two *Spiliada* exception. In *Rappo, Tania* the Singapore Court of Appeal correctly stressed that loss of a particular type of remedy in the foreign court was insufficient to preclude a stay under stage 2.[99] If *some* relief is available, then there is no substantial denial of justice. Consequently, stays have been granted in circumstances where a lower monetary limitation of liability for shipowners would be applied in a foreign court. Here, *a* remedy was available to the claimant abroad; it was just not as favourable as that which would be granted in the forum.[100]

[96] *Unwired Planet International v Huawei* [2020] UKSC 37.

[97] [2020] EWHC 2072 (Ch) (aff'd [2020] EWCA Civ 1293).

[98] See eg *Petroleo Brasiliero SA v Mellitus Shipping Inc* [2001] CLC 1151 (only forum court would recognise a claim for contribution); *Ashton Investments Ltd v OJSC Russian Aluminium (RUSAL)* [2006] EWHC 2545 (Comm) (claim in tort only available under forum law); *TGT v TGU* [2015] SGHCF 10 (no child maintenance claim under foreign law); *China Medical Technologies (in liq) v Paul, Weiss, Rifkind, Wharton and Garrison LLP* [2019] HKCFI 2631 (claim in tort under Hong Kong law would be defeated by a foreign court applying is own law); *Fort Hills Energy LP v Jotun A/S* 2019 ABQB 237 [159]–[161] (claim for negligent misrepresentation only available under forum law); *Re Douglas Webber Events Pty Ltd* (2014) 104 ACSR 250 (claim would fail in New Zealand court as it had no jurisdiction under either New Zealand or Australian companies legislation to allow a derivative action in respect of an Australian company).

[99] *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 [109]–[110].

[100] *The Reecon Wolf* [2012] 2 SLR 289 (HC); *The Chou Shan* [2014] FCAFC 90; *The Herceg Novi v Ming Galaxy* [1998] 4 All ER 238; cf *The Adighuna Meranti* [1988] 1 Lloyd's Rep 384 (HKCA).

An interesting category of cases where the *Spiliada* stage two legitimate juridical advantage concept has been applied is where the dispute concerns legal institutions that are unknown under the law of the foreign court. In several cases courts have refused to stay proceedings where a foreign court from a civil law country would have to adjudicate or enforce provisions of a trust. The applicable law is therefore decisive in such cases.

So, in *Ochi v Trustees Executors Ltd*[101] a New Zealand court allowed an action to proceed because the alternative forum (Japan) did not know the institution of the trust and would regard the settlor's promise to confer property rights on the claimant as an unenforceable oral promise of a gift. So too in *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd*[102] it was found that where an express trust over shares in an Indonesian company governed by Singapore law would not be enforced in proceedings in Indonesia, since Indonesian law does not recognise the trust institution, a stay was refused.

A similar approach and outcome occurred in *Ivanishvili v Credit Suisse Trust Ltd*.[103] Again the Singapore Court of Appeal felt that the forum was best positioned to decide questions of a Singapore-law trust compared to a foreign (in this case Swiss) court. Yet it may be questioned whether this conclusion takes the notion of unfamiliar forum institutions too far. Unlike *Trisuryo*, the competing forum in *Ivanishvili* was Switzerland, which is a member State of the Hague Convention on the Law Applicable to Trusts and on their Recognition,[104] according to which it promises to give effect to express trusts. There was no evidence that the trust would not be enforced by the Swiss court. A 'common applicable law' approach may well have found that the Swiss court would have applied Singapore law and so the main basis for refusal of a stay would have been eliminated.

A similar observation can be made about the English Court of Appeal decision in *Charm Maritime Inc v Kyriakou*[105] where the court refused to stay a proceeding because the competing Greek court would have had to apply the English law of trusts where the concept was unknown to Greek law. Again, specific evidence that the Greek court would not enforce or give analogous relief in respect of the trust would have been desirable.

By contrast, a New Zealand court, in dealing with a related issue in the *Ivanishvili* dispute[106] applied equivalence principles to grant a stay where a claimant brought claims for a constructive trust based on unjust enrichment and breach of fiduciary duty. While the claims and remedy of constructive trust were not known to Swiss law, equivalent causes of action and remedies existed which could be relied upon by the claimant in respect of the alleged

[101] [2009] NZHC 2477. [102] [2017] 2 SLR 814. [103] [2020] SGCA 62.
[104] 1 July 1985 The Hague No. 30 (entered into force 1 January 1992).
[105] [1987] 1 Lloyd's Rep 433. [106] *Ivanishvili v Credit Suisse AG* [2018] NZHC 1755.

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losses.[107] While the *form* of the claims would be different the substance and outcome would be materially the same. The court noted, however, that if no relief had been available in the foreign court, then *Spiliada* stage two would have been engaged.

So, where some relief exists under the law of a non-trust country that approximates that of a common law country, particularly in terms of remedial outcomes, then the interest of the forum in comity and respect for foreign tribunals should prevail. Forum law institutions must not just be *unfamiliar* to foreign courts; they must be unenforceable with no equivalent relief.

The same argument may be made in relation to the decisions in which it has been held that the appropriate forum for disputes concerning the corporate governance or internal management of a company is the place of incorporation.[108] While the law of the place of incorporation is significant factor identifying the natural forum under stage one of *Spiliada*, it should not preclude another court adjudicating the matter unless there is evidence that no relief would be available in that tribunal. An example of the latter situation is the *Douglas Webber* case referred to earlier.[109]

Denial of justice has also been said to arise in a case where a foreign court would apply a law that departs from a standard set by an international convention, where forum law embodies such standard. There is little common law authority on this issue although in *Herceg Novi v Ming Galaxy*[110] the English Court of Appeal suggested that where forum law is based on a convention that has 'received universal acceptance' and so represents 'an internationally sanctioned and objective view of … substantial justice' it may be given greater weight in a stay application. In that case, however, the claimant failed to show that the 1976 Convention on Liability for Maritime Claims (applicable in the forum) satisfied the above test since it had (at the time) only 30 State ratifications.[111] In a very recent decision, the Hong Kong Court of Appeal reached the same conclusion in respect of the 1996 Protocol to the 1976 Convention.[112] Accordingly, in both cases, a stay was granted which led to the claimants being subject to a lower monetary limit in suits against shipowners. Yet, there was no denial of justice in these cases in any event because the claimant could still obtain *some* relief in the foreign court.

The same observation can be made about two other cases in which the decision to refuse a stay was justified (in part) on the basis that forum law was consistent with a widely accepted treaty or instrument. In both *Banco*

[107] ibid [149].
[108] See eg *Konamaneni v Rolls-Royce International Industrial Power (India) Ltd* [2002] 1 WLR 1269; *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 (Sing CA).
[109] See (n 98).
[110] [1998] 4 All ER 238.
[111] See also *Seismic Shipping v Total E & P UK plc* [2005] EWCA Civ 985.
[112] *The Milano Bridge* [2022] HKCA 157.

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Atlantico[113] (considered above at IIIB.6) and *The Adhiguna Meranti*[114] denial of justice is a better explanation for each decision. In the first mentioned case, the claimant would 'face summary rejection of its claims' in the foreign court while in the second, the claimant's damages would be confined to a 'derisory sum'. Hence, the fact that a foreign country has not adopted a particular treaty on a subject (even if it represents an international standard), should not by itself be a ground for refusal of a stay, unless the claimant would also be denied substantial relief in the foreign court.

C. Personal Injury and Defamation

In certain categories of claim, notably defamation and personal injury, distinctive rules apply concerning the role of the applicable law in securing the appropriate forum.

1. Personal injury

In the context of personal injury claims, where an individual sues a foreign corporation arising out of an injury occurring outside the forum, courts in all the common law jurisdictions considered (except for Canada) routinely refuse to stay their proceedings. This conclusion is reached under both the *Spiliada* ('more appropriate forum') and the *Voth* ('clearly inappropriate forum') tests. Courts prefer to retain jurisdiction even though the law of the place of the wrong or injury is a substantial component of all choice of law rules for tort.[115] In England, Australia and New Zealand such law applies as a presumptive rule while in Singapore and Hong Kong it forms the second limb of the 'double actionability' principle.

In *Zhang* and *Puttick*, two decisions noted earlier, the High Court of Australia refused to stay proceedings where an individual suffered injury abroad and the applicable law was foreign. In both cases the court emphasised that an Australian court could not simply be a clearly inappropriate forum because foreign law was the *lex causae*. Something more had to be shown although in both cases the 'something more' was frankly difficult to discern, given that the connections with Australia were slender. Perhaps the court proceeded on an unarticulated jurisdictional preference for the injured claimant suing a foreign corporation. Certainly, such a view would have resonance in the personal injury

[113] *Banco Atlantico SA v The British Bank of the Middle East* [1990] 2 Lloyd's Rep 504.
[114] [1988] 1 Lloyd's Rep 384.
[115] For Australia see *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 and for England see Rome II Regulation art 4(1) enacted in The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834). cf in Canada where 'jurisdiction simpliciter' may not exist in this situation under the 'presumptive factors' in *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 [90]. In such a case the *forum non conveniens* inquiry is not reached: see *Misyura v Walton* (2012) 112 OR (3d) 462.

context where an individual would normally have substantially fewer resources and less capacity to engage in litigation abroad. Given that the burden of trial is much greater for the claimant it is therefore appropriate that the (foreign) applicable law has less influence.

Sometimes courts explicitly refer to this aspect such as in *Stylianou v Toyoshima*[116] where an English court refused a stay despite Australian law being the *lex causae*. The court noted that the claimant was an English resident who was severely injured and could not travel to Australia for the trial or to obtain instructions. Most of the evidence was also in England and so the applicable law had little significance.[117]

Singapore and Hong Kong court decisions are consistent in result. In *Goh Suan Hee v Teo Cher Teck*,[118] the Singapore Court of Appeal allowed a claimant to proceed in respect of an accident abroad, despite that country's law being the *lex causae*, where the bulk of evidence was in the forum. In *Kwok Yu Keung v Yeung Pang Cheung*[119] the Hong Kong Court of First Instance refused to stay an action where the *lex loci* (PRC law) would have provided grossly inadequate compensation to the claimant. The basis refusal of the stay was therefore the denial of justice ground under stage two of *Spiliada*.

So personal injury is an area where the applicable law is less relevant to the forum determination unless a claimant is seeking to proceed in the forum to avoid an unattractive foreign law, in which case it provides further support for refusal of a stay.

2. *Defamation*

Defamation also involves some special features when it comes to the interaction of applicable law and appropriate forum. Such cases typically involve a claimant who sues a foreign publisher in respect of publication in the forum with the claimant confining his or her damages to harm locally suffered and proceeding exclusively under forum law. The consistent approach in such cases has been to refuse a stay[120] where the claimant can show more than mere trivial harm to his or her reputation in the forum.[121]

The applicable law in the foreign forum has consequently been rarely examined in detail in cross-border defamation cases. If however, as is often the case, the defendant publisher resides in the United States and seeks a stay

[116] [2013] EWHC 2188.

[117] See also *Pike v The Indian Hotels Company Ltd* [2013] EWHC 4096 (QB); *Wink v Croatio Osiguranje DD* [2013] EWHC 1118 (QB); *Hardaker v Mana Island Resort (Fiji) Ltd* [2018] NSWSC 1863 and *O'Reilly v Western Sussex Hospitals NHS Trust* [2010] NSWSC 909 [40].

[118] [2009] SGCA 52.

[119] [2006] 1 HKC 107.

[120] See eg *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575; *Berezovsky v Michaels* [2000] 1 WLR 1004 (HL); *Lewis v King* [2004] EWCA Civ 1329; *Breeden v Black* [2012] 1 SCR 666.

[121] *Jameel v Dow Jones & Co Inc* [2005] QB 946.

in favour of that country's courts, it is normally assumed by all parties and the forum court that no cause of action would be available in the foreign court because of the First Amendment to the United States Constitution. Consequently, common law courts have often seen defamation disputes as effectively 'single forum' cases where the applicable law of the forum was highly relevant to the decision of the forum court to exercise jurisdiction.[122]

More recently however, in England, the requirements for establishing jurisdiction in cross-border defamation cases have been changed by statute out of a concern that English courts had become magnets for 'libel tourism'. Specifically, claimants with little connection to England but with global reputations were suing foreign publishers for defamation based on publication in England alone. Section 9 of the Defamation Act 2013 now requires a claimant who intends to sue a non-UK domiciled defendant to show that England is clearly the most appropriate place to bring an action. This test has led to dismissal of actions for want of jurisdiction in several cases for reasons other than the applicable law.[123] The applicable law is therefore likely to be a lesser feature of forum determinations in defamation cases in English courts in the future.

In Canada also, there has been a recent departure from the earlier mentioned common law consensus with a majority of the Supreme Court staying a defamation claim brought by a prominent Canadian businessman against an Israeli newspaper on appropriate forum grounds in *Haaretz.com v Goldhar*.[124] The main reason for the decision was not the applicable law but because trial in Israel would be fairer and more efficient for the defendant.

Seven judges of the court did, however, address the significance of the applicable law in cross-border defamation cases. Four judges considered, in line with the traditional common law approach to defamation cases referred to earlier, that the applicable law in the forum was the only relevant law to consider. If the claimant was suing in the forum in relation to a local publication, then forum law would apply and it mattered not what the competing foreign court would do.[125] By contrast, three judges in *Haaretz* considered that the comparative nature of the *forum non conveniens* inquiry *requires* an examination of the applicable law in the alternative forum to provide a complete picture for the stay application.[126] This view is more consistent with the common applicable law approach advocated earlier.

[122] See cases at (n 120) and *Mardas v New York Times* [2008] EWHC 3135 (QB) and generally R Garnett and M Richardson, 'Libel Tourism or Just Redress: Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases' (2009) 5 JPrivIntL 471.

[123] *Wright v Ver* [2020] EWCA Civ 672; *Ahuja v Politika Novine 1 Magazini DOO* [2016] 1 WLR 1414 (QB).

[124] [2018] 2 SCR 3.

[125] McLachlin CJ, Moldaver and Gascon JJ (with whom Karakatsanis J agreed on this point) ibid [207], [100]. This was the position in previous Canadian cases, see *Breeden v Black* [2012] 1 SCR 666 [32]–[33]; *Éditions Écosociété Inc v Banro Corp* [2012] 1 SCR 636 [49].

[126] Cote J (with whom Brown and Rowe JJ agreed) ibid [89].

Presumably, if the foreign court were found to apply the same law as the forum, then this may enhance the case for refusal of a stay on the basis that the forum would be best equipped to apply its own law and/or that no advantage in the foreign court existed for the defendant. Alternatively, a common applicable law finding may have the effect of 'neutralising' the applicable law as a factor, as in *VTB*, and allow the forum to grant a stay safe in the knowledge that the claimant will suffer no injustice in the foreign court. In *Haaretz* however, according to the expert evidence, an Israeli court would have applied Israeli law to the Ontario tort and so there was no common applicable law.

Despite the slender majority against examining the choice of law rules of the competing foreign jurisdiction, the British Columbia Court of Appeal in *Giustra v Twitter*[127] explicitly took such an approach. The claimant there sued the US company Twitter for defamation, with the defendant seeking a stay. The court agreed to exercise jurisdiction on almost entirely applicable law grounds, saying that while the claimant's case would entirely fail under United States law in the US court, the claimant would still have an arguable case in respect of the tweets published in Canada under Canadian law. In essence, the court relied upon the denial of justice principle at stage two of *Spiliada* to deny a stay. While this case did involve a comparative applicable law approach, it is consistent in outcome with the 'single forum' defamation cases which assumed that the claimant would obtain no relief in the foreign court. The *Giustra* approach, however, may be useful to claimants in reinforcing their position that they would have no claim under foreign law.

D. International Commercial Courts

The long-standing role of the English Commercial and Admiralty Courts as successful adjudicators of complex cross-border disputes and the recent emergence of international commercial courts in Singapore and Dubai raises the question as to whether foreign law should be given reduced significance in stay applications before such tribunals. Specifically, given these courts' expertise and familiarity with diverse legal systems, it may be argued that the risk of error in application of foreign law and injustice to a defendant is less than would be the case if the matter were heard by a predominantly 'domestic' tribunal.

The issue has not been explicitly addressed in English case law, although at section III.B.3 above it was noted that English courts often find little difficulty in applying foreign law, particularly when that law is from a common law country. Indeed, the Admiralty Court in *The Al Khattiya*,[128] stated that it was 'very familiar with civilian legal systems'.[129] In Singapore and Dubai International Financial Centre (DIFC) decisions, by contrast, there is clearer evidence of

[127] [2021] BCCA 466. [128] [2018] EWHC 389 (Adm). [129] ibid [80].

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specialist international courts enjoying wider jurisdiction in matters involving foreign law.

For example, the Singapore Court of Appeal in *Rappo, Tania*[130] stated that while the existence of the Singapore International Commercial Court (SICC) does not oust the *Spiliada* principle, the scope for resolution of a matter by the SICC is nevertheless 'a factor' that may be considered in the *forum non conveniens* analysis. Hence, where foreign law would apply as the *lex causae* in the Singapore court, such connecting factor may be accorded less weight under stage one of *Spiliada* where the SICC has retired foreign judges who are 'familiar and adept' at applying such law.[131] Further, the SICC has the capacity to order that any question of foreign law be determined on the basis of submissions, instead of proof by experts.[132] Yet, the existence of the SICC is not a 'free pass to elude all jurisdictional objections to the adjudication of a dispute in Singapore',[133] and the claimant must still identify 'the particular quality or feature of the SICC' that is relevant to the case, to defeat a stay. It will be interesting to see how this approach is applied in future Singapore cases.

The *Spiliada* test also applies in the DIFC courts but again its influence seems to be weakening, with stays being refused in several cases involving foreign law. For example, in *Al Mojil v Protiviti Member Firm (Middle East) Ltd*[134] the DIFC Court of First Instance exercised jurisdiction in a case involving Saudi law, with the court finding that, 'with the assistance of appropriate expert evidence' it was 'certainly well equipped to deal with [such] issues'.[135] The same result has been reached in DIFC decisions involving English,[136] Swiss[137] and United States/Canadian law.[138] While no statement of principle has been issued comparable to that in *Rappo, Tania* above, the DIFC courts have expressed few doubts as to their competence or suitability to adjudicate foreign law questions.[139]

While the logic of international commercial courts being better qualified than mainstream domestic courts to decide foreign law matters is undeniable, it would be unfortunate if such an approach led to a diminution of trust and comity towards foreign courts and an overbroad exercise of jurisdiction over defendants. The principles of *Spiliada* and *VTB* should remain pertinent.

[130] *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265.

[131] ibid [122]. Interestingly, the SICC itself said in *BNP Paribas Wealth Management v Agam* [2017] 3 SLR 27 [47] that that as an international commercial court, with an international judge from France, it was equipped to apply French law to decide a dispute.

[132] Rules of Court O 110 r 25.

[133] *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 [123].

[134] [2015] DIFC CFI 020 (aff'd [2016] DIFC CA 003).

[135] ibid [35].

[136] *Tavira Securities Ltd v Re Point Ventures* [2017] DIFC CFI 026.

[137] *Al Khorafi v Bank Sarasin* [2012] DIFC CA 003.

[138] *KBC Aldini Capital Ltd v Baazov* [2017] DIFC CFI 002.

[139] The DIFC has a similar procedure to the Singaporean O 110 r 25: *Fidel v (1) Felecia (2) Faraz* [2015] DIFC CA 002.

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IV. EXCLUSIVE JURISDICTION AGREEMENTS AND THE APPLICABLE LAW

A. The General Approach

At the outset, it is important to note that exclusive jurisdiction agreements play an important role in limiting jurisdictional risk and exposure by allowing the parties to identify a forum in advance for dispute resolution. Courts should therefore interpret and enforce such agreements liberally to support party autonomy in international dispute resolution. A stay of proceedings to enforce such an agreement (where a foreign court is chosen) should therefore in principle be easier to obtain than one sought on *forum non conveniens* grounds.

The approach of common law countries to exclusive jurisdiction agreements is, at a broad level, very similar but in application there appears to be a divergence between Australia and other jurisdictions on the role and significance of the applicable law in a stay determination.

The standard test in all jurisdictions examined stems from the English decision *The Eleftheria*.[140] According to this decision, a forum court, when presented with a proceeding brought in breach of an exclusive choice of court or jurisdiction agreement, must stay the proceeding unless it finds that there are 'strong reasons' not to do so. A raft of factors was provided by the judge[141] in that case to guide the exercise of the court's discretion, including factors of connection and convenience, like those considered in the stage one of the *forum non conveniens* inquiry. More recently, however, it has been accepted that, at least where commercial parties are involved, factors of inconvenience cannot generally amount to 'strong reasons' as such matters should have been foreseeable at the time of contracting.[142]

The position of the applicable law under *The Eleftheria* test is interesting. While the judge specifically referred to the governing law of the contract and whether it differed from the law of the forum) as a relevant factor, in later cases its status has also been (correctly) downgraded. Once more, where parties have expressly chosen a governing law in conjunction with an exclusive forum to resolve their disputes, they can hardly complain about the inconvenience of that choice. Substantive law disadvantages therefore must have less weight as they are mere incidents of the foreign jurisdiction which were 'part of the bargain'.[143] In principle, therefore, where a commercial party has entered a valid exclusive jurisdiction agreement, it should be held to its bargain unless it would suffer a denial of justice in the foreign court, that is, be deprived of a fundamental claim or remedy. Most of the common law jurisdictions examined in this article now follow this approach.

[140] [1970] P 94.
[141] ibid, 99–100.
[142] *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* (2010) 79 ACSR 383; *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368.
[143] *The Benarty* [1984] 2 Lloyd's Rep 244, 251; *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399, 414.

Independently of this basis, a claimant may also be permitted to sue in the forum if it can show that the foreign exclusive jurisdiction agreement is invalidated by an overriding mandatory rule of the forum. It is obvious that where parliament has taken away the right of parties to choose their place of litigation by express words, for example, to protect persons with lesser bargaining power from having to sue abroad, then the agreement can have no effect. Such 'mandatory jurisdictional provisions' are generally clear and uncontroversial.[144] Courts should, however, be mindful not to allow claimants to bring 'colourable' attacks on foreign exclusive jurisdiction agreements to defeat a stay application; the challenge must satisfy the good arguable case standard.

B. Australia: Wide Operation of Mandatory Substantive Law

What is much more contentious has been the use by Australian courts since the leading High Court decision in *Akai* in 1996[145] of 'mandatory substantive rules' to deny enforcement of foreign exclusive jurisdiction agreements. It is suggested that the applicable law of the forum has been given excessive operation in stay determinations. While this point was earlier noted in the context of *forum non conveniens* stays,[146] here the objection to forum law is stronger given the presence of an exclusive jurisdiction agreement.

While it is permissible for parliament to legislate that Australian law applies compulsorily to certain categories of contract, it is arguably an overreach for the courts to allow claimants to rely on such legislation to defeat freely bargained foreign exclusive jurisdiction agreements, based only on vague and untransparent public policy considerations.[147] This result occurred in *Akai*, where a New South Wales insured corporation was permitted to sue a Singaporean insurer in New South Wales despite being bound by English exclusive jurisdiction and choice of law clauses. A majority of the High Court found that forum legislation (the Insurance Contracts Act 1984 (Cth)) was a mandatory substantive rule which precluded enforcement of the jurisdiction agreement for reasons of public policy.

The *Akai* principle has since been applied in many subsequent Australian decisions, with corporate claimants relying upon statutory 'public policy' to avoid a foreign exclusive jurisdiction agreement.

For example, in *Home Ice Cream v McNabb Technologies LLC*[148] the Federal Court recently granted an anti-suit injunction to restrain a United States proceeding, brought in the court stipulated in the jurisdiction

[144] See eg in Australia, Carriage of Goods by Sea Act 1991(Cth) section 11(2), ACL section 67(b).
[145] *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.
[146] See text at (nn 73–78).
[147] M Keyes, *Jurisdiction in International Litigation* (Federation Press 2005) 268; M Davies, AS Bell, PLG Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (10th edn, LexisNexis 2020) [7.43].
[148] [2018] FCA 1033 and *No.2* [2018] FCA 1093.

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agreement, where a claim under section 18 of the ACL (misleading and deceptive conduct) was brought in Australia. The court emphasised that a foreign exclusive jurisdiction agreement could not prevail over a 'statutory protective provision' of Australian law with 'the only court capable of determining [such questions] being an Australian court'.[149] The protective aspect of the Act lay in the fact that it 'sought to address the consequences for consumers of misleading and deceptive conduct'.[150] The presence of such legislation amounted to a strong reason to justify non-enforcement of the foreign exclusive jurisdiction agreement.

The reference to consumers in the last statement is somewhat ironic though, for in almost all decisions where the section 18 has been applied as a 'mandatory substantive rule' to overcome a foreign exclusive jurisdiction agreement, the claimant has been a corporate or commercial entity.[151] The characterisation of forum law as 'mandatory' has clearly acted as an incentive to such claimants to bring proceedings to undermine foreign exclusive jurisdiction agreements.[152]

By contrast, New Zealand and Canadian courts have been much more circumspect in respect of similar statutory misleading conduct claims. In *Society of Lloyds and Oxford Members' Agency Ltd v Hyslop*[153] the New Zealand Court of Appeal considered an argument that an English exclusive jurisdiction clause should not be enforced because the claimant would be denied rights under the Securities Act 1978 (NZ). The Court noted that the Act is designed to protect New Zealand investors and that foreign parties should equally be subject to its terms in New Zealand court proceedings. Such a factor was, however, outweighed by the 'overwhelming weight' of circumstances supporting trial in England. The same result on similar facts was reached by the Ontario Court of Appeal.[154]

The view expressed by the Canadian and New Zealand courts is that absent a showing of denial of justice, such as when *no* cause of action or remedy would be available to the claimant in the foreign court, a valid foreign exclusive jurisdiction agreement should prevail over a forum mandatory rule. Party autonomy and protection of contractual expectations strongly support this conclusion. In principle it should not therefore be necessary for a defendant to rely on common applicable law or equivalence arguments to show that the foreign court would apply the Australian statute or give comparable relief. The foreign exclusive jurisdiction agreement should generally be determinative with applicable law considerations exceptional.

Of course, actions involving genuine consumers or other persons with lesser bargaining power stand in an entirely different position and stays should

[149] [2018] FCA 1033 [19].
[150] [2018] FCA 1093 [17].
[151] See also *Commonwealth Bank of Australia v White* [1999] 2 VR 681; *Faxtech Pty Ltd v ITL Optronics* [2011] FCA 1320 [18].
[152] Bell (n 86) [5.42].
[153] [1993] 3 NZLR 135.
[154] *Ash v Lloyds Corporation* (1992) 9 OR (3d) 755.

generally be refused in such cases to protect claimants' access to rights under Australian statute law.[155] Consistently, the Supreme Court of Canada recently refused to enforce a foreign exclusive jurisdiction agreement[156] where the claimant was an individual suing a large foreign corporation for breach of forum privacy legislation. The parties' agreement in which the jurisdiction clause was contained was described as a 'consumer contract of adhesion' with gross inequality of bargaining power. In such cases, therefore, the mandatory law of the forum is properly determinative of jurisdiction.

The *Akai* court, however, suggested a possible exception to the principle that stay should normally be refused where a forum mandatory substantive rule was present: where the defendant can prove that the foreign court would apply the relevant Australian rule in its proceedings. This is a common applicable law-type test, yet in no Australian decision concerning foreign exclusive jurisdiction agreements has this conclusion been reached,[157] perhaps because ultimately Australian courts are reluctant to surrender jurisdiction to foreign courts to apply Australian mandatory statutes.[158]

The High Court in *Akai* did not refer to the alternative 'equivalence' principle earlier considered as a means of blunting the significance of a mandatory forum law. Yet in a few cases Australian courts have accepted expert evidence of foreign law that substantially comparable rights and remedies would be available in the foreign court to those under the ACL and granted a stay on that basis.[159] The adoption of the equivalence approach in these cases suggests some flexibility on the issue.[160]

The interaction between forum mandatory substantive rules and foreign exclusive jurisdiction agreements in Australia was recently addressed in litigation involving the Epic Games company. Epic developed a popular online video game *Fortnite* and objected to restrictive conditions imposed by Apple and Google on the distribution of its apps. Epic separately sued both companies in Australia for breaches of Australian competition legislation (the Competition and Consumer Act 2010 (Cth) (CCA)) for misuse of market power

[155] See eg *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861 and *Quinlan v Safe International Forsakrings AB* [2005] FCA 1362 but cf *Gonzalez v Agoda Co Pte Ltd* [2017] NSWSC 1133 (Singapore exclusive jurisdiction agreement enforced against Australian consumer).

[156] *Douez v Facebook Inc* [2017] I SCR 751.

[157] It has been suggested that an ACL claim for misleading and deceptive conduct, for example, could be characterised as a tort under the choice of law rules of a foreign country and so admitted in the foreign court on that basis: see Davies *et al.* (n 147) [8.58].

[158] This was the result in *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033 [20], *Faxtech Pty Ltd v ITL Optronics* [2011] FCA 1320 (although no expert evidence was led on that issue) and *Urban Moto Imports Pty Ltd v KTM AG* [2021] VSC 616 [76] (unconscionability under ACL).

[159] *Leigh Mardon Pty Ltd v PRC Inc* (1993) 44 FCR 88, 104–105; *Parnell Manufacturing Pty Ltd v Lonza Ltd* [2017] NSWSC 562.

[160] See Bell (n 86) [3.111]. Note that in both *Home Ice Cream Pty Ltd v McNabb Technologies LLC* [2018] FCA 1033 [21] and *Urban Moto Imports Pty Ltd v KTM AG* [2021] VSC 616 [76] no comparable relief was found to exist under foreign law.

and unconscionable conduct under the ACL. The relief sought was injunctive and declaratory relief. Both Apple and Google sought a stay of the Australian proceedings, relying on the California choice-of-law and exclusive jurisdiction clauses in the licensing contract between the parties.

In the *Epic v Apple* phase of the litigation[161] the Full Court of the Federal Court reversed the decision of the trial judge and refused to stay the proceedings. The trial judge had found on the expert evidence that both the competition law and ACL claims could be heard in a Californian court under United States jurisdictional principles.[162] The Full Court did not overturn this finding but instead found strong reasons to overcome the exclusive jurisdiction agreement based on public policy grounds arising from the Australian competition legislation. First, the court discerned a legislative policy that claims pursuant to statutory competition law should only be determined in an Australian court. Competition claims have a public dimension involving conduct that may adversely affect the state of markets in Australia and the interests of consumers. Secondly, even if the United States court could adjudicate the competition and ACL claims, there were legitimate juridical and forensic advantages to Epic that would not be available in proceedings in California.[163] Hence, while the United States court may have jurisdiction to hear the Australian statutory law claims, key aspects of such claims would not be available.

Further, the Court suggested that it may be futile for a defendant to attempt a comparative applicable law-type analysis in the context of a stay based on a foreign exclusive jurisdiction agreement. Even if the foreign court would admit the claims

> the process of determining the claims in the foreign court through the prism of expert evidence is not the same as ascertaining and applying the law directly. One of the difficulties and uncertainties involved in proving foreign law is the risk that important aspects of the foreign law may be lost in translation with matters of meaning and context overlooked and misconstrued. Also a judgment of the foreign court is unlikely to make a contribution to the body of Australian law.[164]

In effect, claims based on Australian mandatory statutes should only be determined by Australian courts.

The decision is therefore highly nationalistic and unilateralist, compared to cases such as *VTB* where the UK Supreme Court entrusted the resolution of English law claims to a Russian court. The decision is also insufficiently

[161] *Epic Games Inc v Apple Inc* [2021] FCAFC 122. [162] [2021] FCA 338.
[163] *Epic Games Inc v Apple Inc* [2021] FCAFC 122 [104], [108], 109], [122]. For example, the more stringent requirements for injunctive relief under United States law, the capacity for factual findings to be used as evidence in a subsequent proceeding, the availability of specialist judges in the Federal Court and the potential for the Australian competition regulator to intervene in local proceedings. [164] *Epic Games Inc v Apple Inc* [2021] FCAFC 122 [110].

cognisant of the important role and function of exclusive jurisdiction agreements and places foreign entities in a difficult position in negotiating agreements with commercial counterparts in Australia. The inclusion of a foreign jurisdiction agreement is now vulnerable to challenge wherever an Australian statutory claim with asserted public interest credentials is identified.

In the very recent companion Epic action against Google,[165] there was a further examination of the interrelationship between substantive mandatory rules and foreign exclusive jurisdiction agreements. While the judge was effectively bound by the earlier Full Court decision involving Apple to refuse a stay given the highly similar facts, the defendant sought to circumvent this decision by three strategies involving the applicable law. The aim of each was to show that the claimant would not suffer a denial of justice in the event of litigation in the foreign court.

First, Google argued that any claims of Epic under Australian competition law could be admitted in a California court under local choice of law rules so that a 'common applicable law' outcome would be reached which would neutralise Epic's case against a stay. Secondly, Google gave an undertaking to both the court and Epic that it would not rely upon the Californian choice of law clause to resist the pleading by Epic of claims under Australian statutory law in any California proceeding. Thirdly, even if the precise Australian law claims could not be heard in California, functional equivalents of such rules and remedies existed under the law of the foreign jurisdiction.

On the comparative applicable law point, the judge examined the expert evidence of Californian choice of law rules and found it unlikely that a Californian court would apply the Australian CCA or ACL.[166]

Regarding the undertaking given by Google not to resist the application of Australian law in a Californian court, the Australian judge was also sceptical. The status of undertakings in stay applications is a little-explored topic outside the field of statutes of limitation and submission to jurisdiction, where defendants have given undertakings to waive an expired statute of limitation in the foreign court[167] or to submit to its jurisdiction[168] as a condition of a stay being granted. Google's attempt to use an undertaking to obtain a stay in the context of substantive law shows how important applicable law has become in forum determinations. While the judge accepted in principle that an undertaking may be employed to overcome the problem of the applicable law in the foreign court, on the facts the undertaking was given little weight due to concerns regarding its enforcement, particularly by the Californian court, and its limited scope.[169]

[165] *Epic Games Inc v Google LLC (Stay Application)* [2022] FCA 66.
[166] ibid [46].
[167] cf *Exportrade Corp v Irie Blue New Zealand Ltd* [2013] NZCA 675 [56].
[168] See eg *Lubbe v Cape Plc* [2000] UKHL 41.
[169] *Epic Games Inc v Google LLC (Stay Application)* [2022] FCA 66 [51], [53], [56].

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The third strategy for Google regarding the applicable law was to assert that any rights and remedies sought by Epic in the Australian proceeding could be replicated in equivalent relief under California or United States law. The court, however, found that any causes of action and remedies under United States/Californian law were less generous to the claimant and would provide much less certainty of recovery. There were also other juridical advantages to Epic under Australian law in proceeding in Australia.[170]

Having found that a Californian court would not apply Australian law under its choice of law rules, that Google's undertaking to accept Australian law in the foreign court was ineffective and that Epic's causes of action and remedies had no precise equivalents in Californian law, the court refused the stay. The *Epic* litigation therefore confirms the strong hold of mandatory forum statutes in stay applications in Australian courts concerning foreign exclusive jurisdiction agreements.

C. Other Common Law Jurisdictions

By contrast, in other common law jurisdictions, the applicable law has featured far less prominently in stay applications concerning exclusive jurisdiction agreements. As noted earlier, non-Australian courts have been less willing to allow the circumvention of foreign jurisdiction agreements based on public policy considerations arising from forum laws. Instead, applicable law differences do not amount to strong reasons unless the claimant is left without a cause of action or remedy in the foreign court.[171] The point is made emphatically by the Singapore Court of Appeal in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[172] where the court referred to denial of justice as arising where trial in the agreed court 'would be so overwhelmingly difficult … that a stay would effectively deny the plaintiff access to justice'.[173] This principle was exceptionally satisfied in the *Trisuryo* case, examined earlier, where Indonesian law, as a civil law system, would not recognise a Singapore law-governed trust and so the claimant would be without a remedy in the chosen forum. Clear and compelling prejudice to the claimant must therefore be shown.

Also, in the case of England, there have been relatively few cases in which stays have been sought to enforce foreign exclusive jurisdiction agreements. Most decisions have involved English jurisdiction agreements which the courts are only too happy to enforce, even where foreign courts have allowed their circumvention. So, in the English aftermath of the *Akai* case,[174] the Commercial Court granted an anti-suit injunction to restrain the insured from

[170] ibid [134]–[153], referring to CCA sections 80, 83, 87(1A) and (2)(b).
[171] *Baghlaf Al Zafer Factory Company v Pakistan National Shipping Company* (*No.2*) [2000] 1 Lloyd's Rep 1.
[172] [2018] SGCA 65.
[173] ibid [134].
[174] *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

pursuing the Australian proceeding as it was in breach of English exclusive jurisdiction and choice of law agreements. The fact that an Australian court allowed proceedings to be brought for public policy reasons arising from local statute was irrelevant to the English court. From its point of view, the only relevant applicable law here was English law given that this was chosen by the parties. An anti-suit injunction was also granted by an English court to restrain proceedings in Canada which had been brought in breach of English exclusive jurisdiction and choice of law agreements.[175] The court emphasised that its decision was grounded in party autonomy, namely respect for jurisdiction agreements and governing law clauses.

These decisions are consistent with those mentioned earlier[176] where English courts refused to stay proceedings where the parties had expressly chosen English law in their contract, but the foreign court would not give effect to such choice. In this context the forum court again exercises jurisdiction to vindicate the applicable law and court chosen by the parties.

D. Summation

So, Australian law largely stands alone in giving substantial operation to the applicable law of the forum in cases involving stay applications to enforce foreign exclusive jurisdiction agreements. While attempts have been recently made through use of common applicable law, equivalence and undertakings methods to negate or neutralise the effect of the applicable law, courts have generally allowed claims to proceed in the forum where the applicable law reflects a public policy of parliament. Arguably, however, the importance of exclusive jurisdiction agreements as risk control devices has been undervalued.

The approach taken in other common law jurisdictions is preferable: agreements are only not enforced where statute has invalidated them by express words, or the claimant would be denied justice in the chosen forum either because of their status as a consumer or due to an oppressive foreign law. Such an approach ensures that the applicable law plays a limited role in determinations involving foreign exclusive jurisdiction agreements.[177]

V. PLEADING AND PROOF OF FOREIGN LAW

A comment should also be made about the rules of pleading and proof of foreign law in a stay application. Foreign law is treated as a question of fact in a common

[175] *OT Africa Line Ltd v Magic Sportswear Corp* [2005] EWCA Civ 710.
[176] See section III.B.6.
[177] It is unclear whether the 2005 Hague Convention on Exclusive Choice of Court Agreements will change this position. Relevantly, a foreign exclusive choice of court agreement may not be enforced where to do so 'would lead to a manifest injustice or be manifestly contrary to public policy of the court seised' (art 6(c)). An Australian court, for example, may consider the operation of a mandatory substantive forum statute as part of 'public policy'. This provision also applies as between Australia and New Zealand: see TTPA section 25(2)(c).

law court and must be pleaded and proven in evidence by one of the parties before a court can recognise its existence. In a stay application it will normally be the defendant who seeks to rely on foreign law as a defence to a claimant's action, by asserting that such law would apply to the claim(s), in any trial in the forum or the foreign court.

The English law approach to pleading and proof of foreign law was recently considered by the Supreme Court in *FS Cairo (Nile Plaza) LLC v Lady Brownlie*.[178] The *Brownlie* case involved an application to serve out of the jurisdiction, which required, amongst other things, that the claimant show a reasonable prospect of success on the merits. The parties agreed that Egyptian law would govern the claim in an English court, but no evidence of such law had been led by claimant or defendant. The claimant argued that in the absence of evidence of Egyptian law, it should be able to rely on English law by default. The Supreme Court rejected this argument, adopting instead a test based on the 'presumption of similarity' of forum and foreign laws. According to the presumption, where the foreign law is likely to be similar to English law on the matter in issue, with no difference in outcome, English law should be applied.[179] Unlike the 'default' principle, however, there may be circumstances where the presumption should not apply, such as where the foreign law is not another common law system or where it is contained in a statute.[180]

Importantly for the present article, the court also suggested that 'the procedural context' in which the issue of foreign law arises is important in applying the presumption of similarity.[181] Specifically, there is more scope for a claimant to rely on the presumption 'at an early stage of proceedings' where lower thresholds of proof such as 'reasonable prospects of success' and 'good arguable case' are applied than where the presumption is used by that party to prove its case at trial. In *Brownlie*, in the absence of any evidence of Egyptian law, the court applied the presumption of similarity to conclude that the claimant had a real prospect of success under English law and so service out was warranted. In a stay application based on *forum non conveniens*, a claimant could also presumably employ the presumption where the defendant has shown only that foreign law is the *lex causae* under forum choice of law rules, but not proven the content of such law. So, for example, where the defendant has not established that the foreign law is too complex or unfamiliar for an English judge to apply, the claimant could assert that English law should govern on the basis of its presumed similarity with the foreign law. Defendants are therefore strongly advised to produce substantial

[178] [2021] UKSC 45 (Lord Leggatt, with whom Lords Reed, Lloyd-Jones, Briggs and Burrows agreed).
[179] ibid [124], [126].
[180] ibid [144]–[145]. The presumption may also not be so easily applied in libel cases, where the risk of differing laws is higher: *Soriano v Forensic News LLC* [2021] EWCA Civ 1952 [63].
[181] ibid [147].

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evidence of foreign law at the jurisdictional stage if such law is to be a material feature of their stay application.

If the English court refuses a stay after applying the presumption in favour of the claimant, the defendant, of course, is not estopped from adducing further evidence of foreign law at trial, since this is a different stage of the proceedings with different standards of proof. The forum court will also be less likely at trial to apply the presumption to benefit the claimant given the higher standard of proof required of that party.

The position in other common law countries is less clear. While in Australia an approach similar to the 'presumption of similarity' has been adopted by some courts,[182] the High Court has generally endorsed the 'default' rule whereby a claimant is entitled to rely on Australian law in any case where the defendant fails to prove the content of the foreign law.[183] By contrast, in Singapore, the 'default' rule applies as the basic approach but with the qualification of the Court of Appeal in *Rickshaw Investments v Nicolai Baron von Uexkull*.[184] The Court of Appeal said that the forum court may, despite a party's failure to adduce proof of the content of foreign law, 'have regard to the fact that the principles in the foreign jurisdiction concerned will, in all likelihood, differ from the *lex fori*'. Hence, 'the mere factum of a foreign *lex causae* may be accorded due weight'[185] in a stay application, particularly where, as was the case in *Rickshaw Investments*, the foreign law is a civil law system. The Singapore position is therefore similar to that in *Brownlie*, but with a slightly more liberal approach to proof of foreign law in jurisdictional determinations.

VI. CONCLUSION

This article has examined an important topic in international civil litigation: the role of the applicable law in determining the appropriate forum for trial. While in civil law countries the concepts of jurisdiction and applicable law are strictly separated, in common law jurisdictions they are becoming increasingly intertwined. Courts have relied on the applicable law to resolve forum disputes in two distinct areas: where a defendant seeks a stay of a proceeding on *forum non conveniens* grounds and where a claimant seeks to justify local proceedings brought in breach of a foreign exclusive jurisdiction agreement. While it is acknowledged that extensive consideration of the applicable law at the jurisdictional stage can add delay and cost to proceedings, the benefits

[182] *Damberg v Damberg* (2001) 52 NSWLR 492; *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223.

[183] See eg *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331. See also *Nicholls v Michael Wilson* (2010) 243 FLR 177 [334] and *Palmer v Turnbull* [2018] QCA 112. New Zealand law appears to be similar: *Torchlight Fund No 1 LP (in rec) v Johnstone* [2015] NZHC 2559 [79].

[184] [2007] 1 SLR(R) 377.

[185] ibid [43].

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to parties in anchoring trial in their preferred forum, particularly in providing leverage in settlement negotiations, seem more compelling.

An important guiding principle is that a court can best apply its own law and so the appropriate forum should normally coincide with the applicable law. There are, however, countervailing circumstances that may favour a forum court retaining jurisdiction notwithstanding a foreign governing law, such as where the dispute is predominantly factual or where application of foreign law would not be too onerous. Reciprocally there are cases where a foreign court can be 'trusted' to apply the law of the forum, such as where a common applicable law would be selected under both countries' choice of law rules or the foreign court would grant equivalent relief under its law to the claimant to that available under the law of the forum. An overriding concern is to treat the parties with equality: to prevent a defendant being subjected to exorbitant application of forum law and jurisdiction while at the same time ensuring that the claimant is not denied justice in the foreign court. Australian courts, however, have adopted a more forum-centred approach to jurisdiction and consequently given less weight to foreign law as a factor. They have also accorded wide operation to mandatory substantive rules, particularly (and controversially) in cases involving foreign exclusive jurisdiction agreements.